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SOME OBSERVATIONS ON THE DOCTRINE OF PROXIMATE CAUSE.

CONSISTENT advance in the development of legal doctrines and in their application is impossible without a clear understanding of elementary definitions and concepts. While this has been insisted upon frequently in the past, to-day as never before there is a movement in all departments of knowledge, — in law, in metaphysics, in mathematics, — to reëxamine the concepts, axioms, and definitions upon which the superstructure of knowledge rests, and to secure greater clearness and accuracy of statement.

The great burden of legal decisions, in particular, is creating a demand for a more definite statement of principles which shall emancipate to some extent from the tyranny of things. In the general revision of elementary definitions it has been found that the value of comparing kindred ideas in different departments of learning is not confined to the study of languages or myths, and that such a method has a wide range of application. This must be my excuse for the non-legal portion of the present article. The term "proximate cause" has often been used by the bench as well as the bar in a vague and confused way, and such statements of it embedded in the decisions of able courts tend to add still further to the obscurity of the doctrine in the mind of the lawyer who has not given it special study. For this reason an historical and comparative study of the doctrine may be perhaps of some value.

The concept of Proximate Cause was first distinctly stated as a legal doctrine by Bacon, and was embodied in the first of his maxims in the phrase *In Jure non remota Causa, sed proxima spectatur.* The modern legal doctrine seems to be narrower and more definite in its application than some of the older expressions of the concept which can be found in more primitive systems of law or in the writings of philosophers prior to Bacon.

The concept has been applied, especially by the American courts, in four kinds of cases: (1) actions on policies of marine insurance; (2) highway cases; (3) actions of tort especially for negligence; (4) measure of damages.

(1) Let us consider first actions on policies of marine insurance.[1]

[1] Cp. 2 Arnould on Marine Ins., 6th ed., 727; Ionides *v.* Universal Marine Ins. Assn., 14 C. B. N. S. 259.

An insurance policy is of course a contract, but a contract of a peculiar kind, because from public policy the law tends to be favorable to commerce and to do what it can to protect and foster it. Cases of this kind will therefore furnish an interesting example of how a concept is altered in application by other circumstances.

In the case of Nelson *v.* Suffolk Insurance Company,[1] a vessel insured by the defendant company negligently collided with another vessel, and the owner of the insured vessel had to pay damages. He then sought to recover these damages which he had paid from the insurance company on the ground it was a peril of the sea insured against. The court held he was entitled to recover. Fletcher, J., said:[2] "We are thus led at once to inquire what losses come within the provisions of the policy as losses by perils of the sea. In ascertaining the cause of a loss in question, in a case of insurance, courts are governed by the well-known maxim of the law, *in jure non remota causa sed proxima spectatur.* This is now the well-established rule and is taken to be in accordance with the intention of the parties to the contract." In other words "whenever the thing insured becomes by law directly chargeable with any expense, contribution, or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss."[3]

The defence in the principal case relied upon the argument that the negligence of the plaintiff was the proximate cause of the having to pay damages and not the collision itself, although the collision would not have happened except for the negligence,[4] but the court held otherwise. Now what we have to notice is that the parties are conclusively presumed to intend that the maxim shall apply to their contract. Courts may differ as to whether or not a particular action A is proximate to a certain result R, and in deciding this question they may be influenced more or less by public policy; but if A *is* the proximate cause of R, then the contract is interpreted accordingly.

I shall have occasion to point out later that "proximate" in the phrase "proximate cause" does not necessarily mean next in place or time.[5] The term "proximate" in general has one of the follow-

[1] 8 Cush. 477 (1851). [2] P. 490.

[3] Peters *v.* Warren Ins. Co., 14 Pet. 112, per Story, J.

[4] This is much like the famous reply of St. Thomas Aquinas to the argument that God creates man and man commits sin, therefore God commits sin. If we assimilate the reply to the language of the court in the above case, "the negligence of God in creating a being with a sinful nature is not the proximate cause of the sin."

[5] 1 Shearman & Redfield, Negligence, 5th ed., sec. 26, citing 48 Minn. 134; Howe, Studies in the Civil Law, 202.

ing meanings: (1) no meaning at all, (2) principal, (3) nearest, (4) obvious. In many cases, however, and particularly in cases of insurance contracts, the nearest cause in time and place is considered the proximate cause.

"The maxim *causa proxima non remota spectatur* is of importance to be observed in these contracts. For it will be difficult, if not impossible, in the case of successive misfortunes happening to a ship from divers causes, to make a just apportionment of the injury to the peril; and as a general rule, which, when understood, will produce equality in its application, to attribute the loss to the last peril that affects the vessel, she having survived antecedent ones, is as safe and convenient as any which can be suggested." [1]

And in an English case, Mr. Justice Willes said: —

"In ascertaining the relative rights of the parties, you are not to trouble yourself with distant causes, or to go into a metaphysical distinction between causes efficient and material and causes final; but you are to look exclusively for the proximate and immediate cause of the loss." [2]

It may indeed happen that two causes appear to be contemporaneous and efficient. In such a case the rule has been stated by the Supreme Court of the United States [3] as follows: —

"When there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate when the damage done by each cannot be distinguished."

In regard to another kind of contract, viz. Bills of Lading, it has been observed by Broom: [4] —

"It should be noticed that exceptions in bills of lading are not construed strictly according to the maxim, . . . but the efficient, or, as it is sometimes called, the *causa causans*, is regarded to determine the liability of the ship-owner on his contract of affreightment."

Thus where the bill of lading contained an exception of accidents or damage of the seas, rivers, and steam navigation of whatsoever nature or kind soever, a ship-owner was held liable for loss of goods

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[1] Parker, C. J., in Rice *v.* Homer, 12 Mass. 230, 234 (1815). Cp. Shearman & Redfield on Negligence, 5th ed. (1898) §§ 57–60. Cited *infra*.

[2] Ionides *v.* Universal Marine Ins. Co., 14 C. B. N. S. 259, 289 (1863).

[3] Howard Fire Ins. Co. *v.* Norwich, etc., Transportation Co., 12 Wall. 194, per Strong, J., citing with approval Phillips on Insurance, 1136, 1137.

[4] Legal Maxims, 6th ed. (1884), 216. This work treats generally of proximate cause and Lord Bacon's Maxim on pp. 211–224.

by collision caused by the gross negligence of the master or crew.[1]

(2) Let us now pass from the region of contract at common law to that of statutory liability. Cities and towns are made liable in this state for injuries caused by defects in highways which are due to their wrong or neglect. The liability here arises not from agreement, but is imposed by the state, and is therefore peculiar to the statute in question ;[2] nevertheless the defect must be the proximate cause of the loss in precisely the same sense as in a case of marine insurance.[3] Here, to be sure, as the obligation is created by statute the maxim is applied rather to favor the city, whereas in the insurance case it is applied without favor to the insurance company. In other words, the proximate cause in a highway case must be a wrong of the city, and the city is liable, as Judge Holmes expresses it, not *qua* cause but *qua* wrongdoer.[4]

[1] Lloyd *v.* Screw Collier Co., 3 H. & C. 284; Grill *v.* Grill, L. R. 1 C. P. 600; Bank of India *v.* Netherland Steam Navig. Co., 10 Q. B. D. 521.

[2] Rev. Laws, c. 51, sec. 18, for example, provides that " If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair or a want of a sufficient railing in or upon a way, causeway, or bridge, and such injury or damage might have been prevented, or such defect or want of repair or want of railing might have been remedied by reasonable care and diligence on the part of the county, city, town, or person by law obliged to repair the same, he may, if such county, city, town, or person had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair or want of a sufficient railing, recover damages therefor from such county, city, town, or person."

[3] Buswell on Personal Injuries, 2d ed., section 109, says one effect of the statute is that the rule that the contributory negligence of a third party will not excuse a defendant whose negligence is of itself an efficient cause of the accident is held not to apply. See generally 11 Allen 500; 7 Gray 104; 11 Gray 142; 13 Gray 344; 32 Me. 46; 20 Me. 47.

[4] Hayes *v.* Hyde Park, 153 Mass. 514. Cp. Marble *v.* Worcester, 4 Gray 395 (1855), where a horse became frightened by reason of the striking of a vehicle he was drawing against a defect in the highway. He freed himself from the control of the driver and at the distance of 50 rods knocked down a traveller upon the street who was using due care. It was held, but with a dissenting opinion, that the city of Worcester was not liable, although no other cause intervened.

A review of the decisions of the various states is given by Earl, J., in Ring *v.* Cohoes, 77 N. Y. 83, and the rule which governs in the absence of statutory provisions is stated thus: " When two causes combine to produce an injury to a traveller on a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have happened but for such defect." From this it appears that the Massachusetts doctrine of a more restricted liability is peculiar, and depends entirely on the provisions of the highway statutes. Cp. notes to Morse *v.* Town of Richmond, 98 Am. Dec. 608–612, and to Gilson *v.* Delaware, etc., Canal Co., 36 Am. St. Rep. 807. So Buswell on Personal Injuries, section 109.

Chief Justice Shaw makes the following remarks on the difference between the metaphysical and legal uses of the maxim:[1] —

"The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery. It was a maxim, we believe, of the schoolmen, '*Causa causantis, causa est causati,*' and this makes the chain of causation, by successive links, endless. And this perhaps in a certain sense is true. Perhaps no event can occur which may be considered as insulated and independent, every event is itself the effect of some cause or combination of causes, and in its turn becomes the cause of many ensuing consequences, more or less immediate or remote. The law, however, looks to a practical rule, adapted to the rights and duties of all persons in society, in the common and ordinary concerns of actual and real life, and on account of the difficulty in unravelling a combination of causes and of tracing each result, as a matter of fact to its true, real, and efficient cause, the law has adopted the rule before stated, of regarding the proximate, and not the remote, cause of the occurrence which is the subject of inquiry."

In these highway cases, then, the wrongful act must be the proximate cause of the injury, and the act must be the act of the city. A third party may intervene between the defect and the injury and may in some sense contribute to the latter, but if his act be innocent the city's act is still the proximate cause.[2] For example, in one case a telephone wire had sagged to a point close to the road and a wagon passing along caught its wheels in the wire, thus carrying it along and hitting a man driving in the opposite direction.[3] Mr. Justice Holmes said in the opinion: —

"To an extent not yet perhaps exactly determined wrongdoers are presumed not to contemplate wrongdoing by others, — therefore, generally, they are not liable if another wrongdoer intervenes between their act and the result. But the mere fact that another human being intervenes is not enough. His intervention is important not *qua* cause but *qua* wrongdoer."

(3) Let us now pass into the region of torts, and see what has been said of the maxim in this field. I quote from the last edition of a leading work on Negligence:[4] —

"The breach of duty upon which an action is brought must be not only

[1] Marble *v.* Worcester, 4 Gray 395, 397 (1855).

[2] In Alexander *v.* Newcastle, 115 Ind. 51, the municipality had left an excavation negligently in a street, but was held not liable to one who was violently thrown into the hole by another person.

[3] Hayes *v.* Hyde Park, 153 Mass. 514.

[4] 1 Shearman & Redfield, 5th ed. (1898), sec. 26.

the cause, but the proximate cause of the damage to the plaintiff. . . .[1] We adhere to this old form of words, because, while it may not have originally meant what is now intended, it is not immovably identified with any other meaning, and is the form which has been so long in use that its rejection would make unintelligible nearly all reported cases on the question involved.[2]

"The proximate cause of an event must be understood to be that which in a natural and continuous sequence unbroken by any new, independent cause produces that event and without which that event would not have occurred.[3] Proximity in point of time or space, however, is no part of the definition.[4] That is of no importance except as it may afford evidence for or against proximity of causation, that is, the proximate cause which is nearest in the order of responsible causation.

"The *proxima causa* was originally the same as the *causa causans* or cause necessarily producing the result. But the practical construction of 'proximate cause' by the courts has come to be the cause which naturally led to and which might have been expected to be directly instrumental in producing the result. . . . The necessity for connecting an injury with a responsible agent before compensation can be awarded has led to the identification of the rule embodied in the maxim with another legal principle which bears more directly upon the question of accountability, viz. that 'every man must be taken to contemplate the probable consequences of the act he does.'[5] On the other hand, as we shall point out elsewhere, 'wrongdoers are presumed not to contemplate wrongdoing by others unless they are shown in fact and actually to have contemplated it. Therefore, generally they are not liable if another wrongdoer intervenes between their act and the result.'"[6]

Let us now examine a few cases to see how this definition is applied practically.

In McDonald *v.* Snelling,[7] one whose servant drove in the public street so negligently as to collide with another carriage, thereby

[1] Citing Kistner *v.* Indianapolis, 100 Ind. 210; Scheffer *v.* Railroad Co., 105 U. S. 249.

[2] Citing Ehrgott *v.* N. Y., 96 N. Y. 264, 281; Norwood *v.* Raleigh, 111 N. C. 236; Florida R. Co. *v.* Williams, 37 Fla. 406; Davis *v.* R. R. Co., 67 N. W. (Wis.) 167.

[3] Taylor *v.* Baldwin, 78 Cal. 517; Hoag *v.* Lake Shore, etc., Ry. Co., 85 Pa. St. 293; Milwaukee, etc., Ry. Co. *v.* Kellogg, 94 U. S. 469; Putnam *v.* Broadway, etc., R. R. Co., 55 N. Y. 108; Sharp *v.* Powell, L. R. 7 C. P. 253; Pa. R. R. Co. *v.* Kerr, 62 Pa. St. 353; West Mahoney Transp. Co. *v.* Wagner, 116 Pa. St. 344; Ins. Co. *v.* Brown, 95 U. S. 117; Topsham *v.* Lisbon, 65 Me. 449; State *v.* Manchester R. R. Co., 52 N. H. 552. See also Cooley on Torts 69; Addison on Torts, sec. 6.

[4] 48 Minn. 134.

[5] 36 Am. State Rep. 807, 809.

[6] Holmes, J., in Hayes *v.* Hyde Park, 153 Mass. 514.

[7] 14 Allen 290. Compare Marble *v.* Worcester, p. 544, note 4, *supra*, where the facts were nearly identical.

causing the horse attached to the latter to take fright and run away, was held liable to a person injured by the runaway horse in its flight.

We see at once here that "proximate cause" has no longer the same meaning as in marine insurance contracts. It now means that of which the results are the "natural and probable effect," in the sense that a reasonable man might properly foresee them.[1] Thus in this case the court held a man driving with a careless servant might be reasonably expected to foresee that some trouble of the sort which did happen, might happen. This difference is noted in the opinion of Foster, J., in the case last cited.[2] He says: —

"Perhaps the truth may be that a maxim couched in terms so general as to be necessarily somewhat indefinite has been indiscriminately applied to different classes of cases in different senses, or at least without exactness and precision, and that this is the real explanation of the circumstance that *causa proxima* in suits for damages at common law extends to the natural and probable consequences of a breach of contract or tort; while in insurance cases and actions on our highway statute it is limited to the immediately operating cause of the loss or damage. If this be so, the frequent reference to the maxim in cases like the present is not particularly useful, and certainly not conducive either to an accurate statement of principles or to uniform and intelligible results."[3]

It is claimed that a different rule prevails as to malicious torts from that which applies in the case of ordinary torts.[4] A recent writer says:[5] —

[1] "One who violates duty owed to others or commits a tortious or wrongfully negligent act is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to and in fact do, result from his act." Devens, J., in Smithhurst *v.* Independent Cong. Church, 148 Mass. 261, citing McDonald *v.* Snelling, 94 Allen 290; Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64; Metallic Casting Co. *v.* Fitchburg R. R., 109 Mass. 277; Derry *v.* Flintner, 108 Mass. 131.

In the Cong. Church case snow from a roof fell on a horse causing a wagon to start which injured a passer-by.

[2] McDonald *v.* Snelling, 14 Allen 290, 294.

[3] Compare Thomas *v.* Winchester, 2 Selden 397, where a druggist who carelessly labelled a deadly poison as a harmless medicine was held liable to one who was injured by using it as a medicine, although the article had passed through several intervening hands. Here the injury was a natural and probable result of the druggist's mistake. On the other hand, in Sheffer *v.* Railroad Co., 105 U. S. 249, where by reason of a railroad collision a passenger became disordered in mind and body and some eight months afterwards committed suicide, it was held that his own act was the proximate cause of his death, and that the railway company was not liable.

A contrary view is taken by the author of the note to Gilson *v.* Delaware Canal Co., 36 Am. St. Rep. 809, who says at p. 821 that there is nc difference in the measure of liability between wilful and negligent torts, except perhaps where one wilfully assumes dominion over another's property.

[4] In 25 Law. Rep. Ann. 87.

"Proximate consequences are regarded in case of mere negligence as covering only such direct and immediate results as occur without the intervention of any outside or independent agency, while in the case of wilful and malicious acts, consequences which might have been reasonably expected or foreseen are deemed proximate though outside and independent agencies do intervene."

In other words, in these cases the original evil will is supposed to infect the whole circle of circumstances, and a more favorable rule is applied for the benefit of the injured person, probably with the idea, in part at least, of punishing the prime mover.

In a recent Vermont case one who shot at a dog, which being wounded ran into a house and attacked a person therein, was held to be the proximate cause of such damage; "whether the injury was, or could have been foreseen or not, or was or was not the probable consequence of the act; for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events."[1] The court further said that this rule was universal where the injurious act is wanton;[2] but that in Vermont it is sufficient if the act be voluntary.[3] The limit of this principle (except perhaps in Vermont) is shown in the suit brought by Laidlaw against Russell Sage. It will be remembered that Sage was attacked by one who was trying to extort money by threats, and just as an explosion occurred Sage drew Laidlaw, who was in his office, in front of him. The court held that the explosion and not the act of Sage was the proximate cause of Laidlaw's injuries, as it was not shown that the injuries had been increased by Sage's act.[4]

The principle in malicious torts applies[5] to (1) acts directly malicious, (2) acts like wilful misrepresentations and false warranties, (3) acts conclusively presumed to be malicious, such as violations of statutes. The citizen is presumed to know the statute law, therefore a violation of statute is always constructively wilful.

That the proximate cause may consist of more than one individual acting separately is shown by the case of a collision between two vehicles, where the jury were instructed that the carelessness of either driver to create liability must be the "natural, probable, and proximate cause of the accident," and that if the accident was

[1] Isham *v.* Dow, 70 Vt. 588, per Rowell, J.

[2] 16 Am. & Eng. Cycl. Law 434.

[3] Vincent *v.* Stinehour, 7 Vt. 66; Wright *v.* Clark, 50 Vt. 130; Taylor *v.* Hayes, 63 Vt. 475; Bradley *v.* Andrews, 51 Vt. 530.

[4] Laidlaw *v.* Sage, 158 N. Y. 73.

[5] 25 Law. Rep. Ann. 87.

caused by the carelessness of both drivers, then both defendants were liable.[1] The principle upon which this proceeds is that the act of the defendant being a cause and a direct cause of the injury, the plaintiff should not be deprived of his remedy merely because a third person happens to contribute also to the injury.[2]

Of course if the third person is one for whom the plaintiff is in any wise responsible, as in a case where, for example, the situation being reversed, the doctrine of *respondeat superior* might apply, then the action of such third party becomes the action of the plaintiff and bars his recovery.[3]

If the third person is an agent of the defendant the question is whether he is acting within the scope of his employment or whether his act is simply wanton. The matter has been stated in this way on principle: "The act of a responsible agent is not a natural and probable consequence, and therefore breaks the causal connection whenever it tends to produce an injury of a character different from that which the original tort feasor must, according to the usual theory of accountability, be deemed to have contemplated."[4]

(4) In a matter of damages the question is, not what cause was proximate to certain effects; but, the cause being determined, what effects are proximate to it, can justly be said to constitute the result. Just as in mathematics we do not carry our decimal fractions or logarithms beyond a necessary and convenient number of places, so in law we need a workable measure of damages, albeit exactness is never possible. The legal question is not one of pure cause and effect, but "partly one of cause and effect, partly one of proof, partly one of public policy, and partly one of the nature of the wrong complained of."[5] Damages are generally divided into direct, proximate, consequential, and remote.

Thus, in one case, an aeronaut descended into the plaintiff's garden; and being in peril he called for help. A crowd thereupon broke into the garden and damaged the plaintiff's fruits and vege-

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[1] Randolph *v.* O'Riordan, 155 Mass. 331.

[2] Buswell on Personal Injuries (1893), sec. 103, citing Lane *v.* Atlantic Works, 111 Mass. 136; Sheridan *v.* Brooklyn R. R., 36 N. Y. 39; Barrett *v.* Third Ave. Ry., 45 N. Y. 628; Webster *v.* Hudson R. R., 38 N. Y. 260; Spooner *v.* Brooklyn R. R., 54 N. Y. 230; Eaton *v.* Boston & Lowell R. R., 11 Allen 500; Burrell Township *v.* Uncapher, 117 Pa. St. 353; Carterville *v.* Cook, 129 Ill. 152. Also 122 Pa. St. 288; 122 Pa. St 661; 74 Ia. 392; 71 Wis. 41; 119 Ill. 232.

[3] Little *v.* Hackett, 116 U. S. 366.

[4] 36 Am. St. Rep. 842.

[5] Sedgwick, Elements of Damages, 45.

tables. The aeronaut was held liable for what the crowd did as well as for damage by the balloon.[1] Here the latter damage was direct, the former proximate. Diversion from the plaintiff's business might have been consequential damage, and the loss of prizes he expected to get by his vegetables a remote damage.[2]

The law as to damages may be summed up as follows: Proximate losses are of two kinds, direct and consequential. Direct losses are always proximate and are such as proceed immediately from wrongful conduct without the intervention of any intermediate cause; while consequential losses are proximate when the natural and probable effect of the wrongful conduct is to set in operation the intervening cause from which the loss directly results.[3]

In modern law then we find the concept of proximate cause doing duty in two senses. (1) In contracts and highway cases it means a cause which is fairly the efficient and moving cause of a certain given result, (2) in torts, and in contracts as far as questions of damage are concerned, the defendant's act is a proximate cause of the natural and probable results. In actions of tort the question whether a result is the natural and probable result of a certain act is determined by common sense, *i. e.* by the jury. In contracts the question whether in a given case A or B is the proximate cause of a loss and the cause of losses C and D or whether cause X has intervened to produce D, such intervention itself not being a natural and probable result of A or B, is for the court under certain fixed rules which have grown up.

There are certain other departments of modern law in which the doctrine of proximate cause is still to be considered, but these involve a somewhat different aspect, and I wish to carry the historical survey of the doctrine a little further, after which I will return to them later.

I have already mentioned the fact that the maxim is the first one in Lord Bacon's list. The writer of a "brilliant article"[4] in the

[1] Guille *v.* Swan, 19 Johns. 381.

[2] In the famous Squib Case (Scott *v.* Shepherd, 2 Wm. Bl. 892), the defendant threw a lighted squib into a market. It fell upon the stall of A, who to save himself threw it upon the stall of B, who also threw it away, and it struck the plaintiff and put out his eye. The defendant was held responsible, and the injury was held a ground of liability for the reason that the action of the intermediate agents was involuntary.

[3] Hale on Damages, secs. 22–26. Whether a result is natural and probable is for the jury. Haverly *v.* State Line R. Co., 135 Pa. St. 50. In contracts the question is usually of consequential damages. Hobbs *v.* Railroad Co., L. R. 10 Q. B. 111, 122; Hammond *v.* Bussey, 20 Q. B. D. 79, 89.

[4] 48 Law Times 371.

American Law Review[1] says that the maxim is not found in the civil law nor in English law before Bacon's time. In the preface to his Regulae, Bacon himself says: —

"Whereas some of these rules have a concurrence with the civil Roman law, and some others a diversity, and many times an opposition; such grounds as are common to our law and theirs I have not affected to disguise into other words than the civilians use to the end they might seem invented by me, and not borrowed or translated from them; no, but I took hold of it as a matter of great authority and majesty, to see and consider the concordance between the laws penned and as it were dictated by the same reason."

This seems to show that Bacon himself thought our maxim did not exist in the Roman law. But against these opinions I will put a quotation from Studies in the Civil Law, by W. Wirt Howe of the New Orleans Bar.[2] Mr. Howe says: —

"It is believed that the maxim is not to be found in the Roman law in so many words, but the concept was there. It may have been devised by some canonist, or Bacon may have made it himself after the fashion of his day. When quoted it is often followed by his commentary, in which he says: 'It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause and judges of acts by that without looking to any further degree.'"

About B. C. 286 or A. U. C. 467, a period when many laws were passed in the Roman republic for the benefit of the people,[3] the Aquilian law was passed, designed to give a remedy for wrongful injury to the slaves of another.[4] Celsus, who was a prominent commentator upon the Roman law, speaks of the following case in these words: —

"If one should precipitate a slave from the top of a bridge, Celsus decides that his act would give rise to an action under the Aquilian law, whether the slave should die from the blow he had received, or by being immediately submerged and drowned, or whether he should perish after being tired out in his struggles with the current." [5]

Mr. Howe,[6] after citing this case, says: —

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[1] 4 Am. L. Rev. 201 (1870), Joseph Willard, Esq.

[2] P. 201.

[3] *E. g.* the Hortensian laws. One of these tending to create unity was that the Resolutions of the Tribes should be law for the whole people.

[4] See Grueber Lex Aquilia (1886), 23, 199.

[5] Dig. 9, 2, 2, 7, 7. Cp. Paul as to liability for a fire negligently kindled on a windy day.

[6] Op. cit., p. 202.

"The point of this statement would seem to be that in determining whether a wrongful act is the proximate cause of an injurious result, the question is not merely of time and space but of immediate and efficient causation in the juridical sense."

Celsus also says that there is a difference between the case of one who has killed a man and one who originated the cause from which death resulted. The latter was not liable under the Lex Aquilia, but subject only to an *actio in facto*, like one who had given a sword to a madman.

Let us consider for a few moments the use made of the phrase proximate cause in philosophy.

"It is a correct position," says Bacon, "that true knowledge is knowledge by causes."[1] "And causes again are not improperly distributed into four kinds: the material, the formal, the efficient, and the final. But of these the final cause rather corrupts than advances the sciences except such as have to do with human action. The discovery of the formal is despaired of. The efficient and the material (as they are investigated, that is as remote causes) are slight and superficial, and contribute little if anything to true and active science."

Now of course Bacon has adopted this classification of causes from Aristotle.[2] Aristotle says in his "Organon,"[3] "there is a difference between knowing that a thing is, and knowing *why* it is, and the science of the why has respect to τὸ πρῶτον αἴτιον or *causa proxima* as the schoolmen expressed it."

Joseph Willard, Esq., in the article above alluded to,[4] gives extracts which summarize the views of some of the leading schoolmen. These are so interesting that I take the liberty of quoting nearly all of them.

Marsilius Ficinus[5] says: "From the remote cause the effect does not *necessarily* follow."

Joannes Versor[6]: "*Nam posita causa remota non ponitur effectus, sed ipsa remota removetur.*"

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[1] Nov. Org., Bk. II, Oph. 2. Wharton on Negligence, section 73, by comparing with other passages in Bacon shows that "proximate cause" was regarded by him as "efficient cause." Compare Ins. Co. *v.* Boon, 95 U. S. 117, in which it is said that "proximate cause is the efficient cause, the one which necessarily sets the others in motion."

[2] See Meta., Bk. I, ch. III; Book I, ch. II; Bk. II, ch. IV.

[3] Post, Analy., Bk. I, ch. 13.

[4] 4 Am. L. Rev. 204.

[5] Theologica Platonica, Bk. 9, ch. 4.

[6] Quaestiones super novam logicam, 1 Ar. Post.

Averroes[1]: "It is necessary for demonstration, showing why a thing is that it should be by a proximate cause."

Petrus Tartaretus[2] says: "The demonstration why a thing is, proceeds by a proximate cause."

Sebastianus Contus[3] says: "The knowledge why a thing is, is gained by a proximate cause."

Albertus Magnus says a comet is a remote cause of war, a quarrel the proximate cause.

Occam[4] says: "By the remote cause is not meant something which is cause of a cause or the cause of several causes."

I have alluded in a note to what Thomas Aquinas said about imputing sin to God. The opposite position is stated by Duns Scotus[5] in the phrase: "*quicquid est causa causae est causa causati.*" Aquinas, however, points out[6] the notion of intervening cause, which we have seen is so powerful in law at the present day. "It is to be said that the effect of a middle cause, proceeding from that cause so far as it follows the order of the first cause, is referred to the first cause. But if it proceeds from the middle cause, so far as this departs from the order of the first cause, it is not referred to the first cause. Thus if an agent does something contrary to the mandate of his master, this is not referred to the master as its cause, and similarly sin which free will commits against the precept of God is not referred to God as its cause."

Of course the other side of the case should not be overlooked. In a certain sense the whole causal nexus of the world must be present in order to have the particular accident or event possible.[7] This is expressed in the Buddhist doctrine of Dependent Origination. In the Vissuddhi-Magga[8] it appears that the cause of being in general or of any being in particular may consist of several elements, and if one of these elements be lacking the results will not follow. "For," it is said, "the ignorance, etc., which have been enumerated as constituting dependence when they originate any of the elements of being, namely Karma and the rest, can do so only when dependent on each other and in case none of their

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1 Post, An., Lib. 1, ch. 2, Comment 30.

2 Expositio super textu logices Aristoteles.

3 In Universam Dialectam Aristoteles. 1 Anal. Post, cap. 10.

4 Summa Totius Logicae, 2 pt. of 3 pt., ch. 20.

5 Quaestiones Subtillissimae in Metaphysicam, Book 5, Question 1, Opera IV, pp. 595 b, 596 b.

6 Summa Theologica, 1st pt. of 2d pt., Question 79, art. 1.

7 1 Bosanquet, Logic, 259 ff.

8 Chap. XVII.

number is lacking." On the one hand the proximate cause may be considered as something selected from a causal nexus of co-existing things to express the essence of something; this is use by way of logical explanation. Or, on the other hand, going backward in time, all causes are cut off at the further end which are called remote and then coming down in time everything between the cause and the effect is an instrument of the cause and taken up into it. We should, however, always bear in mind a warning of Lord Bacon: "also you may not confound the act with the execution of the act; nor the entire act with the last part, or the continuation of the act." For example: if there be a lease of land, and the lessee assigns part of his interest without the consent of the landlord, which he cannot lawfully do, and which causes the lease to be forfeited, and the lessor enters to dispossess the lessee, the immediate cause, according to Bacon, "is from the law in respect of the forfeiture, though the entry be the act of the party: but that is but the pursuance and putting in execution of the title which the law giveth." [1]

Now what determines where we shall stop in the process of picking out what we denominate the proximate cause? In other words we have considered the *causa proxima*, we have now to consider the *spectatur*. But in this we have reached a new aspect of the matter, — the question of purpose. There is no longer the mere succession of events in the mechanical world, there is the question of intent.[2] This brings us at once to the consideration of some of the matters in modern law, the examination of which has been deferred until now. Lord Bacon himself pointed out certain cases where in his opinion the maxim did not apply. He says: [3] —

"This rule faileth in covinous acts, which, though they be conveyed through many degrees and reaches, yet the law taketh heed of the corrupt beginning and counteth all as one entire act." *Dolus circuitu non purgatur.*[4]

"In like manner this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance

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[1] 7 Bacon's Works, 329.

[2] "Jedes konkrete Rechtsgeschäft hat zwei Seiten durch deren Abstraktion und generische Betrachtung man zwei Einteilungen der Geschäfte erhält; die eine nach dem nächsten (ersten) *Effekt* der Geschäfte, die Andere nach ihnem *Zweck* (der ersten Absicht) dessen Verwirklichung der Zweite Effekt ist." 1 Holtzendorff, Rechtslexikon, 454-456 (*Causa*).

[3] 7 Bacon's Works, 328.

[4] Broom's Legal Maxims, 6th ed. (1884), 222. Compare as to malicious torts, pp. 547, 548, *supra*.

and that which the law doth principally behold there the first motive will be principally regarded and not the last impulsion." [1]

Thus suppose A fires a pistol at B and misses him, and then runs away, B follows with a knife and stabs at A, but A hits him with a club and kills him. Here it might appear that the killing was done in self-defence, but the law according to Bacon looks to the original motive as governing liability for the whole state of facts.[2] You can hardly bring this case under the maxim by saying that the natural and probable result of A's trying to kill B is that he will kill him in self-defence.

It is true, however, that even in the strictest sense the matter of proximate cause may be involved in a criminal matter. Thus an indictment sometimes fails upon the ground of remoteness.[3] For example, the trustees of a public road were indicted for causing the death of a traveller upon the way caused by their failure to repair the road. The court, however, held that the indictment was bad because the neglect must be their personal neglect and death must be the immediate result of that neglect.[4] Campbell, C. J., observed that on the theory of the prosecution if a town failed to repair a road, and a traveller thereon was killed, all the inhabitants of the town would be guilty of manslaughter. On the other hand, the contributory negligence of the deceased is no defence to the indictment if in fact the negligence of the prisoner was a proximate cause of the death.[5]

Considering the criminal law as we find it above, it appears that one must be a proximate cause of an injury to be liable for it; but if a certain intention has prevailed through a series of acts, that binds them together in such a way that the whole makes the doer proximate to the final result. The parts are looked at (*spectantur*) as one act from motives of public policy.

If we consider other systems of law in other countries we find that one is often held liable for acts of which one, physically speaking, has not been a proximate cause or indeed a cause at all, except as an unfortunate part of the causal nexus of the world at the time the event happened. This shows still more clearly how the pur-

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[1] 7 Bacon's Works, 329.

[2] 1 Hawk. P. C. 87. But see 1 Bishop, Criminal Law, §§ 850, 869; Stoffer *v.* State of Ohio, 15 Oh. St. 47; Ingram *v.* State, 67 Ala. 67.

[3] Broom, Legal Maxims, 6th ed., 223.

[4] Reg. *v.* Pocock, 17 Q. B. 34, 39; Reg. *v.* Hughes, Dearb. & B. 248. Cp. Reg. *v.* Gardner, ibid. 40; Reg. *v.* Martin, L. R. 1 C. C. 56.

[5] R. *v.* Swindall, 2 C. & K. 230; R. *v.* Jones, 11 Cox 544; R. *v.* Rew, 12 Cox 355.

pose of public policy works on the physical world to create liability which shall enforce its own will.

Dr. Post [1] says that the idea that only the actual disturber of the social equilibrium can be punished is very modern, and is a product of the modern state; that it is wholly foreign to other social systems, especially the tribal or clan organization.[2] From the more primitive point of view a breach of social order is equally reprehensible whether it proceeds from intention or from chance; and this is entirely a broader matter than questions like negligence in modern law. Thus among the Papuans of New Guinea a killing is punished without the least inquiry as to the state of mind of the killer. The same is true among certain tribes of the Mongolians, Tartars, Bareans, Gold Coast and Congo natives, and the early Irish.[3] Conversely if the state punishes by chance the wrong man, according to the Moslem code it must compensate the relatives of the sufferer out of the public treasury.[4]

Dr. Post says: "*Es ist ein ganz allgemeines geschlechterrechtliches Prinzip, dass alle Verpflichtung zum Schadenersatz auf dem* objektiven Kausalzusammenhang *beruht, wahrend das subjektive Verschulden gleichgultig ist.*" Thus among the East Indians whoever sells a noxious drink is liable for all damage which may be caused thereby.[5] We have seen above that the same thing is true to-day in modern law; but we invent as a reason for the rule that the one selling is presumed to foresee that damage may result and is held to intend it, while the more primitive peoples look simply to the antecedent actor without any reference to the probabilities or the state of mind of the guilty person.[6] Nor is the penalty confined even to the antecedent actor. In Moslem law if one pushes another off of a high place and the falling man kills a third person, the family of the one who was pushed off is held responsible, although they have an action over against the one who did

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[1] Judge of the Supreme Court at Bremen.

[2] 2 Grundriss der Ethnologischen Jurisprudenz 214.

[3] Kohler, 7 Zeitschr. vgl. Rsw., s. 377.

[4] 2 Post, op. cit., 215.

[5] Kohler, 7 Zeitschr. vgl. Rsw., s. 383.

[6] "Die Versuche der Germanisten, diese Thatsache dadurch zu erklaren, dass man in solchen Fällen einen verbrecherichen Willen fingire, sind vom ethnologischen Standpunkte aus unhaltbar. Wie weit die wigentlichen Wurzeln solcher Rechtssätze zuruckliegen und wie wenig sie unter moderne Begriffe gefasst werden dürfen, kann man daraus sehen, dass bei westäquatorialafrikanishen Stämmen das Kasualdelikt auf einedem Thater innewohnende Zauberkraft zurückgeführt wird, deren nichtvorhanden sein er durch ein Ordal darthun muss." 2 Post, Afrik. Jurisp., s. 29.

the pushing.[1] So if a child is frightened by the sight of a sword and falls into the water the owner of the sword is held liable.[2]

As the tribal status begins to disappear the idea that the doer of the act is the only person liable begins to emerge from the chaos. The person physically causing an injury is still liable, but the penalty is lighter for accidental actions, and in the case of unintentional injuries the corporal punishment gives place to the principle of damages.[3] This, for example, is generally true in Chinese law to-day,[4] and although there are instances in Japanese law of liability for accidental injury, still in the later Japanese law the tendency is to analyze the intentions of the prisoner.[5] In Aztec law the earlier doctrine has entirely disappeared,[6] while in Montenegro the absence of intent to injure is a ground for mitigation.[7]

So, in general, the principle of liability only for intended wrongs is gaining ground, although where the former principle survives the penalties are still severe.[8]

In the tribal state of society no distinction was made between intention and negligence, or between negligence and accident. This was true of the early German, the Greek, and the Roman law,[9] also of the Aztec and Frankish codes,[10] although in the last intentional wrongs were more severely punished than negligent ones.

Of course the attempt to connect responsibility with some acting human will fails, not merely where the results are due to some outside cause which produces the results without reference to or even in spite of the will in question; but likewise wherever the will, though present and active, is not to be regarded as properly a human will at all. Thus insanity, irresistible impulse as in the case of self-defence, drunkenness, being bewitched, extreme youth or senility, illness, have been at all times in varying degrees excuses for injurious action. Sex has also at times been a defence

1 Kohler, Blutrache, s. 23.

2 Ibid.

3 1 Bausteine s. 150; 2 Afrik. Jurisp., s. 28, 29.

4 Kohler, Chines. Strafr., 23, 24.

5 Kohler, 10 Zeitschr. f. vgl. Rsw., 389–391.

6 Kohler, Recht der Azteken, 81.

7 Popovic, Recht u. Gericht in Montenegro (1877), 58.

8 Islamitisches Recht; Kohler, Blutrache, 23. In the Japanese criminal code of 1871 an accidental injury to one's parents is severely punished. Kohler, 10 Zeitschr. f. vgl. Rsw., 389–391.

9 Dareste, Étud. d'hist. du Droit, 200; 2 Brunner, deutsche Rechtsgesch, 545.

10 Kohler, Recht der Azteken, 80, 81: Schröder, deutsche Rechtsgesch, 344, 345.

either in formal law or in the practical application of it. This is shown by the fact that even in Massachusetts, where a woman is legally as responsible for a murder as a man, there has been no woman hanged for murder since 1800.[1]

It would serve no useful purpose for the present discussion, and would take us too far afield, to go into the extent to which the matters above mentioned have been considered at various times and in various countries defences to civil or criminal liability for injuries.[2] The principle is in each case that if the will producing the act in question can be considered a responsible human will, then it is a proximate cause of the injury and liability follows. Whether it can be so considered depends upon a great variety of historical considerations, many of them reaching back to the early times of history. A comparatively modern instance is that of witchcraft. A witch was held to be the proximate cause of all sorts of things, from the souring of cream to the death of a human being, and this although she was assumed to have sold herself to the devil in such a way as to be no longer a free agent.[3] The important thing was the prevention of witchcraft, and a witch was held responsible for acts done much as a man who gets drunk, knowing he may do all sorts of things while in that state, is held liable, or much as an infant or a lunatic is held civilly liable for injuries committed by him.

Thus we see that both in criminal law and in civil law, both in early times and in modern times the human will, which must be found as the proximate cause in all cases, except as we saw in insurance cases, is not always the actual human will existing, but a more or less constructive or imputed will, created by the law with reference to the needs of the particular community. If such a will, whether actual or imputed, can fairly be said to be the efficient cause of matter in question, it is the proximate cause. In this respect the *spectatur* never varies; but the *spectatur* obtains its interest, its continuity with the rest of the law, in defining, according to considerations arising from other branches of the law, what shall be considered a responsible human will.

It may be noted that thus far the whole talk has been of injuries and damages. Logically there seems to be no reason why the principle of proximate cause should be so limited to negative results.

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[1] Report of Atty. Genl., 1899, p. xv.

[2] For primitive law see 2 Post, Grundriss der Ethn. Jurisp., 219–224.

[3] Lea, Superstition and Force.

Suppose one does something of benefit to another and the natural and probable result is a further benefit not originally actually contemplated, is not the benefactor the proximate cause of this also? Unquestionably this is so from a logical point of view, but the doctrine seems not to have been legally embodied, unless it can be so considered from the point of view of *compensation*. One may sue, for example, in certain cases in *quantum meruit* or *quantum valebat* and recover what the goods or services in question are "reasonably worth." This expression "reasonably worth" in a certain sense is a measure of the chain of effects in much the same way that in torts the line is drawn between proximate and remote damages. As a matter of fact, all the effects are looked at in estimating the value of the transaction. It is true all the elements of value are not perhaps contemplated by the doer any more than the injuries were in the other case, but the fiction of constructive intention is implied in the idea of compensation, for the benefit must in a sense have been contemplated in order to be the "act" of the doer which deserves compensation.

In a loose and popular sense we often hear benefits apparently remote ascribed to some person. Thus one who has been saved from a life of drunkenness or dissipation through the influence of A, or has been cured of an apparently fatal illness through the efforts of B, is often heard to say that A or B "was the cause of my fortune," or "I owe my life and my success" to A or B. Here the effects may last over a long series of years, and yet although a human will has intervened, namely the will of the person benefited, he does not hesitate to ascribe the benefits to A or B, who perhaps could not foresee them at all, although they fell within the general scope of his benevolent purpose.

It has been suggested to me that the law of property might furnish a further example. Suppose, for instance, I make a man a present of a fruit tree, or if I give him cattle or sheep, is he not entitled to their increase? And in the Old Testament is not Jahveh continually blessed on this very account as the cause of accumulated prosperity? It may be observed in this last case that Jahveh is the giver of the increase separately through the doctrine of continual exertion of power in perhaps most of the instances which could be cited. But it may be admitted that apart from this, the notion that one who sets in motion a series of causes is responsible for the total result seems to be implied. There seems to me, however, to be no question of proximate cause in these cases of property rights. From the mechanical point of view the

cause of the fruit is the tree, the soil, etc., and the cause of the lambs and calves is their parents. On the other hand, if we consider the "natural and probable result" doctrine as we have seen it in torts, there is a difference between torts and property. In torts certain things happen in the time process, the runaway horse knocks down the traveller, the poison carelessly sold is taken by the sick person. In property something likewise happens in the time process, viz. the increase of the property; but in contemplation of law nothing happens to the right of ownership, which is the "effect" whose cause we are considering. Whatever rights to the increase of the flock exist at all in B exist at the time the flock is handed over by A. It is true there is nothing in existence then to which the rights may attach, but there is but one act of transfer of ownership. It may be argued that a tort case is strictly parallel, for the man who was knocked down by the horse might not have been in the street at all when the horse started to run, but in his house or other place of safety, yet the law regards the whole transaction as proximate effect. But the idea of necessity is involved in the tort case, while in the property cases the whole *dominium* which is transferred has for its leading idea freedom from the will or act of the donor in every possible sense. The fig-tree may be cut down or left; the cattle may be bred or turned into beef and mutton, and in either case the intervening will of the donee of the property is supreme.

Let us now turn our attention to some other departments of life and see what analogies can be found there to our doctrine. The most natural field in which to look for a doctrine intended to be ethical is that of religious and moral law. What is the proximate cause of a virtuous action or of a sin?

Let us first take up the moral law in the region where it has been most largely reduced to a crystallized system, viz. in the juristical works and decisions of the Roman Catholic church. It is interesting to note that the system of questions to and decisions by the higher tribunals of that church gives rise to results not unlike those of the English common law with its accumulations of decided cases. For, unlike the civil tribunals in the countries using the Roman Law, these decisions are accompanied by a short statement of the reason for them, and are published in full for the guidance of priests and others having occasion to consult them. I shall refer only to the well-known work of Gury on Moral Theology.[1]

[1] Compendium Theologiae Moralis, by Joanne Petro Gury, S. J., Professor in the Roman College, 4th ed., Rome, 1852.

The principal difference between human law and the law of the church is[1] that the former can command what it will by virtue of its own nature, and can impose penalties, for the authorities have been ordained of God with the power of laying down rules ;[2] while the ecclesiastical law can render liable only for guilt. To apply this to an injury by one man to another: that it may be a case where "restitution," *i. e.* compensation, is morally necessary, the act complained of must be (a) *Injusta, i. e.* some right must be violated, (b) *Causa damni efficax, i. e.* it must be one resulting in injury, and one which can be imputed to the doer, (c) *Theologice culpabilis,* for there can be no obligation to make reparation in the forum of conscience unless an injury has been committed in the same forum. Thus idiots and somnambulists cannot be morally liable for their acts. Moreover, there can be no injury inflicted in a moral sense where there is no intention to injure; "*ad injuriam enim requiritur intentio nocendi saltem indirecta, seu praevisio damni injusti, saltem in confuso.*"[3]

It thus appears that the doer must not only be the proximate cause of an injury, but must have an intention to inflict a wrong. But, as the last quotation would indicate, this intention need not always be direct. Thus "*voluntarium indirectum illud est quod non intenditur in se, sed in alio directa volito, hoc est quod in causa vel in effectu habetur.*"[4] There are various kinds of "*voluntarium indirectum,*" e. g. "*Proxima vel remota prout valde probabilem connexionem habet cum effectu in mente agentis vel parum probabilem.*" Thus often *blasphemiae impudicitiae, rixae aut injustitiae* are voluntary which are done in a state of intoxication because they can often be foreseen by the drinker, and in fact may be sufficiently foreseen from the habit of doing such things in this condition. Thus they are sinful. But the leader of an army who burns a field or a fortress is not liable though innocent third persons suffer, for this is only *per accidens.* Nor a priest who ignorantly gives the sacrament to a sinner, nor one who having no other place to get money borrows from a usurer at an exorbitant rate of interest, for that is the sin of the usurer.[5]

In general a triple condition must obtain for one to be morally wrong:[6]—

(1) The doer shall have foreseen the evil result at least *in confuso;* for an effect in no wise foreseen cannot be voluntary.

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[1] Op. cit., c. v., De obligatione Legis. [2] Rom. xiii. 2.
[3] Op. cit., sec. 633. [4] Op. cit., sec. 6. [5] Op. cit., sec. 8. [6] Op. cit., sec. 7.

(2) That it was possible for him not to do it, for otherwise the will would be lacking.

(3) That he is not to be held liable merely by reason of a bad result where he is in the exercise of his rights, and the result is therefore excusable. Conversely one may be a well-doer, although from his action an evil effect may follow, if the following conditions are present:[1] (1) if the purpose of the doer is good; (2) if the *causa* is in itself good or indifferent; (3) if the good effect follows as immediately from the cause as the evil effect; (4) if the good effect at least offsets the evil effect.

We see from these extracts that the doctrine of proximate cause in the law of the church is very similar to that of the law of the state, the principal difference being that in the former more emphasis is laid upon actual intent and less use is made of a fictitious and imputed intent. This has been expressed by another religious writer as follows: "A whole act includes its motive. An act of yours is not simply the thing you do. It is also the reason why you do it."[2] To be morally wrong an action must be (1) unjust, (2) harmful, (3) proceeding from an evil intent. Thus sleeping persons are not liable for their actions because there is no intention to do wrong.[3]

But, as we have seen above, the fact that a given result can be reasonably foreseen is enough to create liability in the moral sphere, although the result was not directly intended. This is brought out further in the chapter in Gury's book, "*De Radicibus Restitutionis*," or "Elements of (moral) Damages." He says:[4] —

"Injustus damnificator restituere tenetur; v. g. si quis domum alterius culpabiliter incendat, integrum ejus pretium domino rependere debet. 2°. Totum aequivalens damnis praevisus praeter rei damnificationem, si quae ex ea provenerint. Sic v. g. si opifex solitam operam aliquo tempore omittere cogatur ex eo quod instrumentum ei necessarium destruxeris, illum de luco cessante teneris compensare."[5]

On the other hand, a general intention to do wrong is sufficient. Thus if I intend to burn A's house and by a mistake burn B's, I am morally liable, for the three elements of invasion of right, injury, and evil intent are present.[6]

Just how far theologians are willing to go in the matter of con-

[1] Op. cit., sec. 7.

[2] 4 Phillips Brooks, Sermons, 238.

[3] Gury, op. cit., sec. 633.

[4] Op. cit., sec. 632.

[5] Cp. Ezech. xxxiii. 14, 15; Epist. Jas. v. 4, St. Augustine ad Macedonium says: "non remittitur peccatum nisi restituatur ablatum — cum restitui potest."

[6] Gury, op. cit., sec. 638.

structive intent seems somewhat uncertain. For instance, this question is put :[1] shall a man be held to make restitution, who, by his bad example, has induced others to do injury, and who might well have foreseen the efficacy of his bad example ?[2]

Let us go a step further and consider the question of intent from a purely ethical standpoint. According to Kant the only source of virtue is the good will, and an action can be virtuous *only* when performed from fidelity to the imperative. The principle may be paraphrased in legal terms somewhat as follows: Whatever action proceeds from a virtuous will is a proximate result of such a will, and we may call it good.[3] Where a vicious inclination to do the same thing enters in, then (according to Kant) there is moral contributory negligence, or, if you choose to split up the agent's personality, there is an intervening human agency. For by the interposition of an independent (vicious) motive the causal connection between the good will and the act is interrupted.[4]

Some legal and most ethical writers claim, however, that a vicious will does not prevent an action from being virtuous — at least to some extent, unless it is the proximate cause of such action.[5] In other words, we may have the same case with motives that we had in the marine insurance cases where two contemporaneous causes occur, and where we have to consider which is on the whole the more efficient and call that the proximate cause. Thus if the good impulses to an action constitute 70 per cent. of the " spring," as Martineau calls it, the action would be called virtuous in spite of the 30 per cent. of selfish or other bad motives. Kant's position, if I understand him rightly, is much more like the pre-

[1] Op. cit., sec. 642.

[2] " I. Sententia *probabilior negat* quia ille qui dat pravum examplum non est causa damni sed mera occasio. — S. Lig. n. 537 (St. Liguori, founder of the order of the Redemptorists in 1732; author of Theologica Moralis, etc.) — Salm, Layman, Sauchez, etc."

" II. Sententia *affirmat* quia praebens malum exemplum cua praevisione contagionis, est vere et proprie causa efficax kamni. Billuart, Antoine, Cuniliati, etc."

[3] " The proper and inestimable worth of an absolutely good will consists just in this, that the principle of action is free from all influence of contingent grounds, which alone experience can furnish." Grundlegung, 53. Cp. Seth, Ethical Principles, 165; 1 Martineau, Types of Ethical Theory, 45–77; Paulsen, Ethics, 194.

" The worth of a man depends on his *will*, not on *knowledge*, as aristocratic and self-conceited culture believes — that is the cardinal doctrine upon which Kant's entire philosophy really turns." Paulsen, Ethics, 200.

[4] Cp. Wharton on Negligence, sec. 300; Pollock on Torts, 380; Kant (Rosenkrantz), Grundlegung, 46, 48, 53.

[5] See note to Freer *v.* Cameron, 55 Am. Dec. 668–670; Thompson on Negligence, 1 5 –1155.

vailing legal disfavor of the doctrine of comparative negligence.[1] We can suppose a man on trial at the judgment seat of God claiming to have a certain action counted in his favor. He sets forth a certain good purpose he had in regard to this action, whereupon the devil's advocate points out certain sinful motives which likewise contributed to the performance of the action. According to the present legal doctrine the devil has won his case, for the least negligence or sin in his intention prevents his reward. He who would be virtuous must cast the mote out of his own eye, must observe each tittle of the law, must be a spotless sacrifice, else his labor is vain. Each word of his pleadings must be technically perfect or his case fails. Such I understand to be Kant's view. The other view is much more in accord with the modern equitable notions of set-off. One of the earliest cases in which the question of proximate cause was raised is undoubtedly the account of the Fall. This presents two points. Adam broke what was practically a statute and on modern legal principles he must have been held to have intended all he did, *i. e* his evil will was the proximate cause of his eating the apple. He set up in his defence the independent will of Eve in tempting him ; and she in turn set up the independent will of the serpent in tempting her and in leading her to tempt Adam. But, as we have seen, the two presumptions that one is expected to know the statute law and to intend the consequences of his action are absolute, and neither Adam nor Eve was allowed to plead temptation as an excuse. Adam was condemned on two grounds : first, for breaking the law ; and second, for listening to Eve's temptation ; and he and his descendants were condemned to perpetual hard labor. His expulsion from paradise was not a part of his punishment, but merely a preventive measure designed to deprive him of the chance of acquiring immortality as well as knowledge.

Eve and the serpent were likewise condemned, each for a separate fault, and the relations between them neither increased nor excused the punishment. In other words, when the statute is plain the imperative is absolute. Just as imperative as, for example, that requiring a ship-owner to detain immigrants about to be deported at his peril, and not merely to do all he can to detain them.[2]

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[1] The doctrine is followed only in Ala., Ga., Ill., Kas., Neb., and Tenn., usually with the addition of degrees of negligence. It has been disapproved in Pa., N. Y., Mass., Ia., Wis., Md., N. J., Tex., Mo. For cases see Buswell on Personal Injuries (1893), § 102.

[2] Act Mar. 3, 1891, sec. 10. U. S. *v.* Warren, Cir. Ct. Mass. 1895. Cp. U. S. *v.* Spruth, 71 Fed. Rep. 678.

As to the question of reward or merit, the question of intent has been much debated. Is that man virtuous who acts in a virtuous manner without willing to do so, or he who wills fiercely and perhaps fails? "Who knows what scant occasion gave the purity ye pride in," says Burns, implying that, as Kant holds, the good will is the only proximate cause of true virtue. Is the tree always known by its fruits, can we say that certain results are always proximate to a certain kind of cause?

Of course the same ethical question is presented in many ways. The scholastic and jesuitical disputes as to when deceit may be excusable through the presence of some outside force such as a set of circumstances, where telling the truth would work a certain kind of injury to the speaker or to other persons, is analogous to the use of force in self-defence or in carrying out the purpose of the law. In such a case there is no doubt that A is the proximate cause of a certain falsehood and yet according to some *non spectatur*. Or as Martineau puts it: Can general rules bind against their *raison d'être?*[1] One of the most concise discussions of this question is of course Kant's famous essay, *Ueber ein vermeintes Recht aus Menschenliebe zu lügen*.[2] He says: —

"Whoever tells a lie, however good his intentions may be, must answer for the consequences of it, even before the civil tribunal, and must pay the penalty for them, however unforeseen they may have been, because truthfulness is a duty that must be regarded as the basis of all duties founded on contract, the laws of which would be rendered uncertain and useless if even the least exception to them were admitted."

If we go into the field of optics we find several illustrations of one aspect of the doctrine of proximate cause. This aspect, as might be supposed, has to do with the "*spectatur*." In order to determine responsibility a vast number of attendant circumstances are excluded. So in physical vision, to see any object clearly the attention and focus of sight must be fastened upon the object in question to the exclusion of much beside. On the other hand, as in telescopes and field glasses, the field of vision must be large enough to let in sufficient light. If you look at an illuminated object through a very small aperture you cannot see it as distinctly as through a larger one. So the law must look at enough of the facts of any case to have proper illumination of the principal object of its search. On the other hand, it is important to shut out

[1] 2 Types of Ethical Theory, 353.

[2] (1797) 7 Rosenkrantz, 295.

irrelevant facts, and so an artist will look between his legs or through his hands to get a better estimate of certain values.

We may now sum up what we have learned of proximate cause as follows: From a legal point of view it is of two kinds (1) as in insurance cases, (2) responsibility for a wrongful act whether in tort or contract.

"The fundamental difference between these classes is that in the former investigation ceases when the nearest cause adequate to produce the result in question has been discovered, while in the latter the object is to connect the circumstances which is the subject of the action with a responsible human will." [1]

In other words the doctrine takes two forms. The first is in the field of mechanism or necessity and in the time process. We regard the continuous stream of causation in question and go upstream in our search until we find a spring which can properly be called its source. The question is one of fact, of adequacy to produce the result in a mechanical sense.

In the other field we are dealing with teleology, with purpose, with a human will, actual or constructive, with a world of freedom not of necessity.

Historically it seems probable that the existence of these two aspects of the idea of cause is, partly at least, a question of terminology. *Causa* in Latin meant both cause and reason. "Cause is the condensed expression of the factors of any phenomenon, the effect being the fact itself." [2]

"Of these two senses of the word 'cause,' viz. that which brings a thing to be and that on which a thing under given circumstances follows, the former is that of which our experience is the earlier and more intimate, being suggested to us by our consciousness of willing and doing." [3]

The attempt to refer events to a responsible human will, which we have seen stated in legal terms several times in this paper, is part of a general tendency to consider events from a strictly human point of view. You ask what is the cause of a monument and you find a man had a purpose.[4] You ask what turns a wheel, later you find a man. Then you go away and say: everything is like that

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[1] Adapted from language of note to Gilson *v.* Delaware, etc., Canal Co., 36 Am. St. Rep. 807.

[2] 2 G. H. Lewes, Problems of Life and Mind, iv., sec. 19.

[3] J. H. Newman, Grammar of Assent, 65.

[4] So in the case of a scarecrow. Grote, Phaedo, ii.

wheel; if I investigated enough I should always find a man at the handle. And the man at the handle or whatever corresponds to him is from henceforth known to you as "cause."[1] This may be said to hold true even in marine insurance cases. For the cause of a disaster is deemed to be either the will of a human person or of a divine intelligence, as is shown in the expression "act of God."

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[1] 1 W. K. Clifford, Lectures and Essays, 149.